LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 31 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 532

HUDSON-SHARP MACHINE CO.,
a Wisconsin corporation,
Defendant-Petitioner,

vs.

ERVING PAPER MILLS,
a Massachusetts corporation,
Plaintiff-Respondent.

REPLY BRIEF OF DEFENDANT-PETITIONER, HUDSON-SHARP MACHINE CO.

MAXWELL H. HERRIOTT,
Attorney for Defendant-Petitioner.
411 E. Mason Street
Milwaukee, Wisconsin 53202

HAMMERSMITH-KORTHEUER CO. MILWAUKEE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 532

HUDSON-SHARP MACHINE CO.,
a Wisconsin corporation,

Defendant-Petitioner,

vs.

ERVING PAPER MILLS,
a Massachusetts corporation,

Plaintiff-Respondent.

REPLY BRIEF OF DEFENDANT-PETITIONER, HUDSON-SHARP MACHINE CO.

Respondent's brief in two respects gives an impression, albeit inadvertent, which is inaccurate and misleading.

I.

The respondent gives the impression that there are no cases in which the Statute of Frauds portion of the Uniform Sales Act, here involved, has been raised by a seller as a defense and the burden of proof held to be on the buyer, as plaintiff. The portion of the Uniform Sales

Act here involved is, in Wisconsin, Section 121.04(2), Wisconsin Statutes, and, in New York, Consol. Laws, c.41, as amended by Laws 1911, c. 571, §85, sub. 2.

The two cases quoted from in petitioner's brief are such cases, to wit: (1) *Zimmerman v. Gillman* (1918), 172 N.Y.S. 263, construing said portion of the Uniform Sales Act adopted by the State of New York, to wit: Consol. Laws, c. 41, as amended by Laws 1911, c. 571, §85, sub. 2, set forth in said *Zimmerman* case, and (2) *Berman Stores v. Hirsh* (1925), 148 N.E. 212, 240 N.Y. 209, the court of last resort in New York. Respondent's brief quotes at length from this latter case but does not acknowledge that the action was dismissed *at the close of plaintiff's case* because *plaintiff the buyer,* in the same legal situation as was respondent Erving Paper Mills in this case, "failed to show that the alleged contract comes within the exception of the Statute of Frauds."

II.

As to the difference in proof in determining whether "goods are not suitable for sale to others" or whether the goods are "unsalable," defendant petitioner's witness specifically testified at the trial as follows (Tr. p. 96):

> "If Hudson Sharp at the time it received Erving's purchase order in 1956 had a machine which would tightly wrap paper napkins in polyethylene, Hudson Sharp would have found these machines suitable for sale to others in the ordinary course of its business."

The witness, defendant-petitioner's general manager, was competent to testify as to the suitability of said machines for sale even though plaintiff-respondent might question its weight because of his interest. This testimony by a competent witness as to "suitability for sale"

of the machines, though uncontroverted, was held by the Court of Appeals not adequate to establish the "salability" of the machines. This test was not prescribed by the Sales Act but was adopted by the Court of Appeals. Apparently only testimony of customers willing to purchase such goods would meet the "rule of fairness" first enunciated by the Court of Appeals in this case.

The issue here does not involve the capacity of counsel to foresee what evidence is required for a specified question. The issue is whether the Court of Appeals has the jurisdiction, in view of the rule of *Erie v. Tompkins*, 304 U.S. 64, to ignore state law as to the construction of a uniform statute and enunciate a new rule of law for a "diversity" case, yet decline, when requested so to do, to give the defendant an opportunity to meet the newly-imposed burden under the newly-established rule.

Respectfully submitted,

MAXWELL H. HERRIOTT
Attorney for the Defendant-Petitioner

Dated: October 30, 1964